No. 2757.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

IN THE MATTER OF THE PETITION OF THE EQUITABLE TRUST COMPANY OF NEW YORK, AS TRUSTEE, FOR A WRIT OF MANDAMUS TO BE ISSUED AND DIRECTED TO HONORABLE WILLIAM C. VAN FLEET, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, AND TO SAID DISTRICT COURT.

BRIEF OF RESPONDENT ON PETITION FOR MANDAMUS

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Filed this.....day of March, 1916.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

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This is a petition for a mandamus directed to the Judge of the United States District Court for the Northern District of California, to compel him either to enter a decree in the form submitted, or to set for trial and hearing the cause in Equity pending in that court entitled "The Equitable Trust Company of New York, against Western Pacific Railway Company, et al." No. 169.

The answer of the respondent shows that the cause is not ripe for trial in several respects:

1. There is pending before that court an order directing the Receivers to report to that court all matters and things in connection with the Denver and Rio Grande Railroad Company and Missouri Pacific Railway Company and other corporations, for instructions as to what course the Receivers should have taken with regard thereto.

2. There is pending and undetermined the petition of the Receivers as to whether or not they should bring suit against the Denver and Rio Grande Railroad Company for the enforcement of the contract known as Contract B.

3. There is pending and undetermined before that court the petition of the Savings Union Bank and Trust Company for leave to intervene.

4. That Court has made an order directing that the Denver and Rio Grande and Missouri Pacific be made parties to the action. That portion of that order is now under assault in this Court on petition for Writ of Prohibition.

I.

IT IS ELEMENTARY THAT A WRIT OF MANDAMUS WILL NEVER ISSUE TO COMPEL A COURT TO ENTER A CERTAIN SPECIFIED DECREE.

If any authority is needed for a proposition so elementary, we might cite:

Ex Parte Flippen, 94 U. S. 350.
Ex Parte Burtis, 103 U. S. 238.

II.

IT IS EQUALLY ELEMENTARY THAT MANDAMUS WILL NOT ISSUE TO COMPEL A COURT TO SET A CAUSE OR HEAR IT UNLESS THE CAUSE IS RIPE FOR TRIAL AND A PLAIN CASE OF REFUSING TO PROCEED IS MADE OUT.

In the *Life & Fire Insurance Co. of New York* vs. *Adams,* 9 Peters, 573, the Supreme Court said:

> "Though the Supreme Court will not order an inferior tribunal to render judgment for or against either party, it will, in a proper case, order such court to proceed to judgment. Should it be possible that in a case ripe for judgment, the court before whom it was depending, could, perseveringly, refuse to terminate the cause; this court, without indicating the character of the judgment, would be required by its duty to order the rendition of some judgment; but to justify this mandate, a plain case of refusing to proceed in the inferior court ought to be made out. In *ex parte* Bradstreet (8 Peters, 590) this court said:
>
> " 'We have only to say that a judge must exercise his discretion in those intermediate proceedings which take place between the institution and trial of a suit; and if, in the performance of this duty, he acts oppressively, it is not to this court that application is to be made.'
>
> " 'A mandamus or a rule to show cause is asked in the case in which a verdict has been given, for the purpose of ordering the judge to enter up judgment upon the verdict. The affidavit itself shows that judgment is suspended for the purpose of considering a motion which has been made for a new trial.

> The verdict was given at the last term; and we understand it is not unusual in the State of New York for a judge to hold a motion for a new trial under advisement till the succeeding term. There is, then, nothing extraordinary in the fact that Judge Conklin should take time till the next term to decide on the motion for a new trial.'
>
> "In the case now under consideration, no application is made for a mandamus directing the court generally to proceed to judgment. The petitioners require a mandamus ordering the judge to render a specific judgment in their favor. It is not even shown that the case is in a condition for a final judgment, nor is it shown that the judge is unwilling to render one. The contrary may rather be inferred from his readiness to grant a rule on the defendant, requiring him to show cause why judgment should not be rendered. In a case of such long standing, where it is more than possible the defendant might not be in court where judgment is asked on a confession made by the agent of the plaintiffs, professing to be the attorney of the defendant, the judge may be excused for requiring that notice should be given to the defendant."

On the 21st day of February, 1916, the lower court rendered its opinion to the effect that there could be no determination of the action without the presence of the Denver and Rio Grande Railroad Company and the Missouri Pacific Railway Company as parties.

Prior to the rendition of that judgment, no motion was ever made in said court to set the cause for trial, nor was any request or intimation of any kind or character whatsoever made to the said court that an immediate trial was desired.

The very first request for a trial was made *ex parte* on the 6th day of March, 1916, and at that time the court did not refuse to set the case for trial, but only continued the request for an early trial until this Court could dispose of the writ of prohibition.

The plain fact of the matter is that this is an attempt, by mandate, to set aside the order of the lower court directing the making of new parties herein.

We apprehend that the court will look beyond the mere form of a petition to its effect, and that would be to render nugatory an order of the lower court which it had full jurisdiction to make.

In this connection, we call your attention to the emphatic language of the Chief Justice in the matter of *Parsons,* 150 U. S., 149, where it is said:

> "We cannot by writ of mandamus compel the court below to decide a matter before it in a particular way, nor can we, through the instrumentality of that writ, review its judicial action had in the exercise of legitimate jurisdiction."

Ex parte Flippin, 94 U. S. 348 (24: 195);

Ex parte Burtis, 103 U. S. 238 (26: 392);

Morrison vs. *U. S. Dist. Ct.,* 147 U. S. 14, 26 (37: 60, 65);

Re Hawkins, 147 U. S. 486, 490 (37: 251, 252);

American Constr. Co. v. *Jacksonville, T. & K. W. R. Co.,* 138 U. S. 372, 379, 386, (37: 486, 489, 492);

Re Humes, 149 U. S. 192 (37: 698).

Under such circumstances, it is respectfully submitted that the discretion of the lower court should not be controlled by the extraordinary Writ of Mandamus.

GARRET W. MCENERNEY, and
JOHN S. PARTRIDGE,
Attorneys for Respondent.